

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ONEWEST BANK,

Plaintiff and Respondent,

v.

MIGUEL DE VIVO,

Defendant and Appellant

B229872

(Los Angeles County
Super. Ct. No. PC047351)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Barbara M. Scheper, Judge. Affirmed.

Law Offices of Michael D. Finley and Michael D. Finley for Defendant and
Appellant.

Robert J. Jackson & Associates, Robert J. Jackson, Amy E. Starrett, and John C.
Saginaw for Plaintiff and Respondent.

Miguel De Vivo appeals from a grant of summary judgment in favor of OneWest Bank (OneWest). OneWest sued De Vivo for unlawful detainer after it obtained a quitclaim deed for the property from the purchaser at a nonjudicial foreclosure sale. De Vivo contends the court erred in granting summary judgment to OneWest, arguing: (1) the trustee who conducted the foreclosure sale had no authority to do so and no title to give to the purchaser; (2) the declaration and documentary evidence submitted by OneWest were inadmissible; (3) the purchaser at the foreclosure sale was “defunct” and unable to purchase the property or transfer title to OneWest; and (4) OneWest fabricated the quitclaim deed. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In December 2005, De Vivo purchased a house in Santa Clarita, California. He executed a deed of trust to secure a \$480,000 loan from IndyMac Bank (IndyMac) in order to purchase the property. The deed of trust named IndyMac as the lender, MERS as the lender’s nominee and beneficiary under the deed of trust, and Lawyers Title Insurance Corporation as the trustee. The deed of trust empowered the trustee with the power of sale.

De Vivo stopped making loan payments and a notice of default was recorded on June 5, 2008. On July 8, 2008, IndyMac executed a substitution of trustee, replacing Lawyers Title Insurance Corporation with NDEx West, LLC (NDEx). This substitution was recorded on July 16, 2008. On August 5, 2008, MERS assigned all beneficial interest under the deed of trust to IndyMac. The assignment was recorded on August 13, 2008.

On October 31, 2008, NDEx recorded a notice of trustee sale. On January 30, 2009, NDEx conducted a nonjudicial foreclosure sale and IndyMac purchased the property for \$307,642. The sale deed was recorded on February 11, 2009, and indicated that the amount of unpaid debt plus costs was \$570,821.67.

On September 16, 2009, the Federal Deposit Insurance Corporation (FDIC), as receiver for IndyMac, executed a quitclaim deed on the property in favor of OneWest. The quitclaim deed was recorded on September 22, 2009.

On January 15, 2010, OneWest brought an action against De Vivo and his tenant, Jennifer Grubbs, for unlawful detainer. The trial court granted OneWest's motion for summary judgment. It concluded that OneWest had carried its burden by proving that it had a right to possess the property as evidenced by a certified copy of a trustee's deed upon sale to IndyMac and a certified copy of a quitclaim deed from IndyMac to OneWest. It rejected De Vivo's claim that the foreclosure sale was void on the ground that the foreclosing trustee, NDEx, had been improperly substituted as trustee and had no authority to convey title to IndyMac.

De Vivo moved for a new trial arguing again that the substitution of trustee was invalid and the foreclosure sale void. The court again rejected this argument, reasoning that the deed of trust gave IndyMac concurrent authority to substitute a trustee and that the subsequent assignment of beneficial interest to IndyMac cured any error. De Vivo timely appealed the judgment.

DISCUSSION

"Summary judgment provides 'courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843) A summary judgment motion 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).) 'The pleadings determine the issues to be addressed by a summary judgment motion [citation], and the declarations filed in connection with such motion "must be directed to the issues raised by the pleadings.'" [Citation.]" (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 100 (*Lona*).)

"We review an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. [Citations.] In undertaking our independent review, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts

justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact. [Citations.] ‘We need not defer to the trial court and are not bound by the reasons for [its] summary judgment ruling; we review the ruling of the trial court, not its rationale.’ [Citation.]” (*Lona, supra*, 202 Cal.App.4th at p. 101.)

An unlawful detainer action is a summary proceeding ordinarily limited to resolution of the question of possession. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 (*Vella*).) However, “[a] qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property” (*Ibid.*) Code of Civil Procedure section 1161a, subdivision (b)(3), provides that an unlawful detainer action may be filed “[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected.” Accordingly, “the plaintiff need only prove a sale in compliance with the statute [Civ. Code, § 2924] and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff’s title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment.” (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 160; see also *Vella, supra*, 20 Cal.3d at p. 255.)¹

Because OneWest purchased title from the foreclosure sale purchaser, it also must prove its own acquisition of title from that foreclosure purchaser. (See *Evans v. Superior Court* (1977) 67 Cal.App.3d 162, 167-170.)

¹ OneWest contends that De Vivo’s claims fall outside the scope of matters properly raised in an unlawful detainer proceeding. Because we find De Vivo’s claims lack merit, we do not reach this issue.

Upon default by the trustor under a deed of trust containing a power of sale, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. (Civ. Code, § 2924, subd. (a)(1).) The foreclosure process begins with the recording of a notice of default and election to sell. (*Ibid.*) After the notice is recorded, the trustee must wait at least three months before proceeding with the sale. (*Id.* at subd. (a)(2).) After the lapse of this period, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. (Civ. Code, § 2924f; see also *Lona, supra*, 202 Cal.App.4th at p. 101.)

“The manner in which the sale must be conducted is governed by [Civil Code] section 2924g. ‘The property must be sold at public auction to the highest bidder. [Citation.] [¶] . . . [¶] . . . A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee’s sale is completed, the trustor has no further rights of redemption. [Citation.] [¶] The purchaser at a foreclosure sale takes title by a trustee’s deed. If the trustee’s deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. (Civ. Code, § 2924[, subd. (c)]; [citation.]’” (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 87.)

The statutory scheme has three purposes: ““(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” [Citations.]” (*Lona, supra*, 202 Cal.App.4th at p. 102.)

I

De Vivo contends that OneWest cannot show the foreclosure sale was conducted in compliance with Civil Code section 2924 on the ground that the trustee who conducted the sale, NDEx, had no power to convey the property. He claims NDEx was improperly substituted as trustee by IndyMac since IndyMac was not a beneficiary under the deed of

trust at the time the substitution occurred. De Vivo presumes that the only way to substitute the original trustee is by following Civil Code section 2934a, subdivision (a)(1), which states that beneficiaries to a deed of trust may execute a substitution. Neither the statute nor case law supports his argument. As we shall explain, the deed of trust gave IndyMac authority to substitute a trustee. Thus, IndyMac's substitution of OneWest as trustee was proper and OneWest had authority to conduct the foreclosure sale and transfer title to the purchaser. De Vivo has not shown the existence of a triable issue of material fact on this point.

Civil Code section 2934a, subdivision (a)(1) provides that a trustee “*may* be substituted by the recording . . . of a substitution executed and acknowledged by . . . all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed.” (Italics added.)

Relying on *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868 (*Dimock*), De Vivo argues that because the substitution was not signed by MERS, the beneficiary under the deed of trust, the substitution was invalid and the foreclosure sale was void since NDEx had no title to convey to IndyMac.

In *Dimock*, a first trustee recorded a substitution of a second trustee, but thereafter the first trustee foreclosed on the property. (*Dimock, supra*, 81 Cal.App.4th at p. 872.) Finding nothing on the face of the substitution indicating it was invalid or not bona fide, the court held that, under Civil Code section 2934a, the recording of the substitution of trustee gave the second trustee the exclusive power to conduct a trustee's sale. Because the first trustee had no power to convey the property, its deed to the buyer was void. (*Dimock*, at pp. 874-875, 876.)

De Vivo's reliance upon *Dimock* is misplaced. Unlike *Dimock*, the *substituted* trustee, NDEx, conducted the foreclosure sale after a substitution of trustee was recorded. Moreover, *Dimock* did not address who has the authority to substitute a trustee, nor did it hold that the beneficiary is the only party with that authority. In fact, the *Dimock* court acknowledged that the deed of trust provided that the *lender* also could substitute a

trustee, which it found to be consistent with Civil Code section 2934a and its conclusion that the second trustee alone had the authority to convey title after a foreclosure sale. (*Dimock, supra*, 81 Cal.App.4th at pp. 875-876.)

It is well settled that parties to a deed of trust may agree to a form of substitution of trustee other than that provided in Civil Code section 2934a. (*Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390; see also *Pacific S. & L. Co. v. N. American etc. Co.* (1940) 37 Cal.App.2d 307, 310-311 [“the principal parties to the transaction . . . may by appropriate joint action substitute a new trustee in the place of the original trustee named in the deed of trust.”].) Thus, “the substitution can be accomplished by following the procedure set forth in the deed of trust, and it will be valid even though there has not been compliance with the statutory requisites.” (4 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 10:9, citing *Bennett v. Ukiah Fair Assn.* (1936) 7 Cal.2d 43, 44-45; *R.G. Hamilton Corp., LTD. v. Corum* (1933) 218 Cal. 92, 96; *U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 83-85; *Mutual B. & L. Assn. v. Wiborg* (1943) 59 Cal.App.2d 325, 330.)

In *U.S. Hertz, Inc. v. Niobrara Farms, supra*, 41 Cal.App.3d 68, the court addressed whether it was permissible for the parties to a deed of trust to agree to a form of notice of substitution of trustee which did not comply with Civil Code section 2934a. Examining case law, the court concluded: “The decisions leave no doubt that parties may lawfully contract as to the form of and procedure to be employed in effecting [a] substitution [of trustee].” (*U.S. Hertz, Inc. v. Niobrara Farms, supra*, at p. 84.) Because there was no suggestion that the procedure for substitution of trustee contained in the deed of trust contravened public policy, the court concluded that the substitution of trustee was valid despite not complying with the statute. (*Id.* at pp. 84-85.)

Under the deed of trust, the parties agreed that IndyMac had authority to execute and record a substitution of trustee. The deed of trust provides: “Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the

name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.” IndyMac followed this procedure for substituting NDEx as trustee.

That IndyMac had authority to substitute the trustee also is consistent with Civil Code section 2934a. Subdivision (a)(1) says a trustee “*may* be substituted by the recording . . . of a substitution executed and acknowledged by . . . all of the beneficiaries.” It does not provide that beneficiaries have the exclusive authority to effectuate a trustee substitution. In other words, the statute grants authority to beneficiaries but does not make this authority exclusive.

Subdivision (d) of Civil Code section 2934a provides: “A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the . . . deed of trust for all purposes from the date the substitution is executed by the *mortgagee*, beneficiaries, *or* by their authorized agents. . . . Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee” (Italics added.) The substitution was executed by the mortgagee, IndyMac, and recorded. Once recorded, the substitution gave NDEx all the powers of a trustee and constituted conclusive evidence thereof. NDEx thus had the authority to convey title to the property to IndyMac as the highest bidder at the foreclosure sale.²

In sum, we find the parties contracted for a method for substituting the original trustee under the deed of trust, which gave IndyMac, as the lender, the authority to substitute NDEx. This agreement did not contravene Civil Code section 2934a,

² At oral argument, De Vivo’s appellate counsel argued for the first time that the notice of default was defective because it was signed by NDEx, which had not yet been substituted as trustee. Civil Code section 2924, subdivision (a)(1), permits a notice of default to be filed by the “trustee, mortgagee, or beneficiary, *or any of their authorized agents.*” (Italics added.) The notice of default states that NDEx was acting as agent of the beneficiary, MERS, not as trustee. Thus, the notice of default was proper.

subdivision (a)(1) since that section does not grant exclusive authority to the beneficiary to effectuate a substitution of trustee.

We also conclude that the recorded assignment of beneficial interest executed by MERS in favor of IndyMac cured any error resulting from the substitution of NDEx as trustee prior to this assignment. Once recorded, the assignment made IndyMac the beneficiary and gave it the authority to substitute a trustee under Civil Code section 2934a, subdivision (a)(1). Since the notice of sale was given after the assignment, NDEx had authority to conduct the sale and give a trustee's deed to IndyMac.

“[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272 (*Fontenot*).) We see no reason that this requirement should not apply in opposition to an unlawful detainer action following a foreclosure sale where the defendant claims the sale was improper.

As to De Vivo, the substitution merely substituted one trustee for another, without changing his obligations under the note. De Vivo effectively concedes he was in default, and he does not allege that the substitution of NDEx interfered in any manner with his payment of the debt, nor that IndyMac would have refrained from foreclosure under the circumstances. (See *Fontenot, supra*, 198 Cal.App.4th at p. 272.)³ We conclude that

³ At oral argument OneWest's attorney discussed the recent case *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*), petn. for review pending, petn. filed April 30, 2012. Since OneWest had not cited the case in its brief, we invited De Vivo to submit a letter brief addressing it. He has done so, and we have considered *Debrunner* and his reponse. The primary issue in the case is whether an assignee of a deed of trust must have possession of the promissory note in order to institute a nonjudicial foreclosure sale. (*Id.* at pp. 439-442.) The Sixth District Court of Appeal held it did not. This is not the factual scenario presented here. The *Debrunner* plaintiff also claimed that the notice of default was defective because it did not identify the beneficiary and it listed as trustee an entity that had not yet been substituted. (*Id.* at p. 443.) Citing *Fontenot, supra*, 198 Cal.App.4th 256, the court rejected the plaintiff's claims on the ground that he was “unable to articulate how any technical defect resulted in prejudice to him.” (*Debrunner, supra*, at p. 443.)

De Vivo cannot show a triable issue of material fact as to NDEx's power to conduct the foreclosure sale and convey title to IndyMac, the purchaser at that sale.⁴

II

De Vivo contends that the court erred by not sustaining his objections to OneWest's documentary evidence and by taking judicial notice of the recorded documents submitted by OneWest in support of its motion for summary judgment. We find no error.

We review the trial court's ruling for abuse of discretion. (*Fontenot, supra*, 198 Cal.App.4th at p. 264.)

De Vivo contends that the attorney's declaration for OneWest is deficient under Code of Civil Procedure 437c, subdivision (d). He argues that the declaration does not show that she is competent to testify to the matters stated in her declaration since it "appear[s] to be based solely on her review of records and documents prepared by other people and organizations." He offers no legal citation to support his argument.

Code of Civil Procedure section 437c, subdivision (d) states, "declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations."

In the declaration, the attorney merely lists the attached exhibits, states that her law firm obtained copies of the documents from the Los Angeles County Recorder's Office, and states that she was a custodian of records for the law firm. She makes no factual assertions about the documents. We do not see how she is incompetent to testify to these matters.

⁴ De Vivo's claims that OneWest cannot show that title was perfected and that OneWest's quitclaim deed is a wild deed appear to be based on the ground that the substitution of trustee was improper and NDEx had no authority to convey title. We reject his claims for the reasons already articulated and see no need to address them separately.

De Vivo also contends that the recorded documents submitted by OneWest are inadmissible hearsay and improper subjects for judicial notice. In support of its motion, OneWest submitted copies of the deed of trust, the notice of default and election to sell, the notice of sale, the substitution of trustee, and the quitclaim deed, in addition to the declaration from its attorney stating that these documents were obtained from the Los Angeles County Recorder's Office.

Courts may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).) “This includes recorded deeds.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.) While a court may not necessarily take notice of the correctness of factual matters stated in a recorded document, it may take notice of “the fact of a document’s recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document’s legally operative language, assuming there is no genuine dispute regarding the document’s authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face.” (*Fontenot, supra*, 198 Cal.App.4th at p. 265.)

“Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property” is admissible if (1) the matter stated “was relevant to the purpose of the writing,” (2) the matter stated “would be relevant to an issue as to an interest in the property,” and (3) “dealings with the property since the statement was made have not been inconsistent with the truth of the statement.” (Evid. Code, § 1330, subds. (a)-(c).)

De Vivo claims “the records and documents on which [OneWest] relied are offered for their truth, i.e., to show that [OneWest acquired] title to the . . . property by means of a recorded quit claim deed . . . , and are thus hearsay.” But this is the legal effect of the recorded quitclaim deed, not hearsay. The language of the quitclaim deed expressly states that by it, FDIC, as receiver for IndyMac, “hereby remise[s], release[s]

and forever quitclaim[s] to OneWest” the property. Moreover, this statement is relevant to the purpose of the deed, is relevant to an interest in the property, and dealings with the property have not been inconsistent with the truth of this statement since OneWest seeks to evict De Vivo from the property. (See Evid. Code, § 1330.) Thus, we find no abuse of discretion in the court’s evidentiary rulings.

III

Appellant claims IndyMac became “defunct” on July 11, 2008 and was unable to purchase the property at the nonjudicial foreclosure sale and then transfer title to OneWest.

Appellant does not explain what “defunct” means in this context and the term is ambiguous. It could mean that IndyMac was in receivership, was bankrupt, was dissolved, its corporate status was suspended, or perhaps something else. According to Webster’s dictionary, “defunct” means “to acquit oneself, die.” (Webster’s Third New Internat. Dict. (2002) p. 593.) While IndyMac’s status may be proper for judicial notice, neither side requested this or presented any evidence that would allow us to do so.⁵

⁵ We infer that IndyMac was in receivership since the FDIC signed the quitclaim as receiver for IndyMac. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Pub. L. No. 101-73 (Aug. 9, 1989) 103 Stat. 183), Congress enacted a statutory scheme granting FDIC authority to act as receiver for failed financial institutions, and special powers to carry out that function. As a receiver, FDIC is the successor in interest, assuming “all rights, titles, powers, and privileges,” of the bank. (12 U.S.C. § 1821(d)(2)(A)(i).) Additionally, FDIC takes over operation of the bank, including taking over its assets, collecting all money due, and paying all valid obligations. (12 U.S.C. §§ 1821(d)(2)(B)(i), 1821(d)(2)(B), 1821(d)(2)(H).)

As we have discussed, we invited De Vivo to respond by letter brief to OneWest’s attorney’s discussion of *Debrunner, supra*, 204 Cal.App.4th 433, during oral argument. Exceeding the scope of this brief, De Vivo’s attorney cited to what appears to be a press release that was copied and pasted in the answer to OneWest’s complaint as proof that IndyMac was “defunct.” Allegations in a pleading are not evidence. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 155.) Moreover, the answer says that the FDIC was named conservator of IndyMac, but is silent on the legal effect being in conservatorship or receivership has on an entity’s ability to protect its interest in property.

Appellant also does not cite any authority explaining what legal effect IndyMac's "defunct" status had on its ability to transact with regard to the property. Without more we cannot conclude that IndyMac lacked capacity to purchase the property at the foreclosure sale.

IV

De Vivo claims that OneWest fabricated the quitclaim deed. He argues that the FDIC signatory was actually an employee of OneWest. This claim is purely speculative as De Vivo points to nothing in the record to support it. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1288-1289.)

At oral argument De Vivo's attorney contended that because the quitclaim was signed by FDIC's attorney in fact, Terri Hunter, and OneWest did not produce a recorded power of attorney, it was error for the court to grant the motion for summary judgment. De Vivo's attorney insisted that this argument was raised in the briefing. It was not.

De Vivo's counsel asserted that Civil Code section 1095 requires that in order for a quitclaim deed executed by an attorney acting as attorney in fact to be legally effective, there must be a recorded document giving the attorney authority to act in this capacity. In fact, Civil Code section 1095 provides, "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." The quitclaim deed contains the name of the principal, FDIC, and the name of Terri Hunter as attorney in fact.

OneWest never had the opportunity to respond to this argument since De Vivo did not raise it in his answer, opposition to summary judgment, or appellate brief, despite his assertions to the contrary at oral argument. More fundamentally, the statute De Vivo relies upon does not support his argument. We do not consider it.

DISPOSITION

The judgment is affirmed. Respondent to have its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.